No. 10,823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J Cellars (a copartnership), *Appellants,* vs. PARK, BENZIGER & Co., INC. (a corporation), *Appellee,* and PARK, BENZIGER & Co., INC. (a corporation), *Cross-Appellant,* vs. PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J Cellars (a copartnership), *Cross-Appellees.*	

BRIEF FOR CROSS-APPELLEES.

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Appellants,
vs.
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Cross-Appellant,
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BRIEF FOR CROSS-APPELLEES.

May it please the Court:

We challenge cross-appellant's statement of jurisdiction. It rests appellate jurisdiction upon "28 U.S.C.A. 225(a)", Judicial Code § 128, which grants appellate jurisdiction to review "final decisions", but the cross-appeal seeks review of a non-appealable intermediate ruling, i.e., the ruling refusing cross-appellant's request that the issue of damages be submitted to the jury on the basis of 60,000 cases of wine instead of 26,691 cases.

Cross-appeals must be taken, perfected and prosecuted under the same conditions or circumstances and in the same manner as other appeals, 4 C.J.S. 883, § 427. There must be a notice of appeal, Rule 73 FRCP, from a final decision, Judicial Code § 128. "An appeal cannot be taken from a *part* only of a judgment, order or decree, unless there is a statute permitting it", 4 C.J.S. 204, § 109, and we know of no act of Congress permitting it. Some state statutes, e.g., California, permit it, as in Calif. Code Civ. Proc. § 940, which calls for a notice of appeal from the judgment, or "some specific part thereof". The judgment at bar, however, is without severable parts; it is single, one unit, indivisible, a simple judgment awarding a liquidated sum of money as damages for breach of one contract, declared upon in a single count. The notice of cross-appeal, R. 543, is headed "Notice of Appeal from *Portion* of Judgment", and the text of the notice appeals "from that *portion* of the judgment entered in the above entitled action limiting plaintiff's recovery to the sum of $72,-687.50". An inspection of the judgment, R. 67-68, does not disclose such a "portion"; it is a clerk's form of "judgment on verdict", and the text is,

> "* * * it is considered by the Court that said plaintiff do have and recover of and from said defendants the sum of $72,687.50", with costs,

and is based upon a general verdict, R. 66, which reads:

> "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of $72,687.50."

In jurisdictions wherein an appeal is permitted from a portion of a judgment, the portion must be severed and

identified *in terms* by the judgment itself; and if not, then under a notice of appeal limited by its text to a "portion" of the judgment, the appeal will be dismissed "upon the ground that it is not taken from the judgment, or from any part thereof", *Bank of Visalia v. Curtis,* 131 Cal. 178, 63 Pac. 344; 2 Cal. Jur. 154, § 25. In the cited case, the Court dismissed the appeal, and refused to review an intermediate ruling not carried in terms into the judgment.

It follows that the attempted cross-appeal should be dismissed. The case distinguishes from *Galloway v. General Motors Acceptance Corporation,* 4 Cir., 106 F. 2d 466. There, the appellant failed through an affirmance on the narrower ground of the merits, and hence the ruling leaves unaffected the broader ground of appellate jurisdiction. (See *Ex parte Bakelite Corp.,* 279 U. S. 438, at 448, bottom, and cases cited in marginal note 3.) If we assume arguendo that the case decides in favor of the right to review a portion of a judgment, nevertheless the judgment there was clearly severable or apportionable in its terms.

There is still less basis for review of the other major ground, cross-appellant's Proposition III, relating to a claim of admissibility of evidence. Admission or non-admission of evidence is an intermediate, non-appealable ruling, and there is nothing in the terms of the judgment that states or recites anything about evidence admitted or excluded. "It is elementary that an appeal from a portion of a judgment brings up for review only that portion designated in the notice of appeal", *Glassco v. El Sereno Country Club,* 217 Cal. 90, 92, 17 P. 2d 703, col. 2.

and an Appellate Court is without authority to review any unappealed portion, *Pacific Mutual Life Ins. Co. v. Fisher,* 106 Cal. 224, 237, 39 Pac. 758, 761.

If the cross-appeal is not dismissed, it nevertheless raises no showing of error in the rulings complained of, to which rulings we turn.

I.

ASSUMING A CASE THAT SHOULD HAVE GONE TO THE JURY AT ALL, IT WAS PROPER TO REFUSE TO SUBMIT A BASIS OF 60,000 CASES.

The contract of January 29, 1943, plaintiff's Exhibit 2 (printed as Appendix A to our opening brief on the main appeal) is not a binding contract between the parties for the whole of the 60,000 cases, nor for any quantity in excess of the 26,691 cases specifically described in the contract.

(a) In the contract, in paragraph "Third", an aggregate of 26,691 cases is specifically described as "the quantities now bottled and stored"; and paragraph "Third" then states:

> "and the price for **this block of merchandise** herewith mutually agreed upon * * * shall be as hereby stated",

the price for the block is then fixed as follows:

	In 1943	In 1944
Dry	$5.25	$5.50
Sweet	6.00	6.25

The next sub-paragraph of the contract reads as follows (brackets added by us):

> "It is agreed that shipment of the above mentioned quantities [26,691 cases] will be made first and before any other commitments, and that the balance of the amount of the sale, which has not been bottled [33,309 cases], is to be paid for proportionately as between dry wines and sweet wines the same, but subject to **negotiations** between the parties hereto whereby increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945."

As to the 33,309 cases there is accordingly before the Court an open price contract. Such contracts may be of two kinds: (1) the contract may be wholly silent, thereby leaving the matter to implication; or (2) the contract may contain an expression, in which case there is no room for an implication. Section 9 of the Uniform Sales Act, Calif. Civil Code § 1729, provides in subdivisions (1) and (4) as follows:

> "§ 1729. *Definition and ascertainment of price.*
>
> (1) The price may be fixed by the contract, or may be left to be **fixed in such manner as may be agreed**, or it may be determined by the course of dealing between the parties.
>
> (2) * * *.
>
> (3) * * *.
>
> (4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."

An illustration of a proper case under subdivision (4) is found in *Great Western Distillery Products, Inc. v. John A. Wathen Distillery Co.*, 10 Cal. 2d 442, 74 Pac. 2d 745, where the contract was wholly silent upon the subject of price, thereby raising an implication of a "reasonable price"; and that is equally true of *Dickerman v. Ohashi Importing Co.*, 63 Cal. App. 101, 218 Pac. 458. The case at bar, however, does not fall under subdivision (4), but falls under subdivision (1), because the contract is not silent but instead states how the price is to be arrived at: it is to be "subject to negotiations between the parties".

Subdivision (1) is but declaratory of the law, which contains many illustrative instances. Thus, in *Jules Levy & Bro. v. A. Mautz & Co.*, 16 Cal. App. 666, 117 Pac. 936, the contract stated the prices "were to be fixed by the subsequent agreement of the parties", but they did not subsequently agree. The Court said:

> "It is elementary in law that a contract of sale must be certain as to the thing sold, and designate the price to be paid for it (Civ. Code, § 1727); and it is well settled that if an executory contract of sale is uncertain and incapable of being made certain in the essential particular of the price to be paid for the thing sold, neither of the parties can be held to its terms, nor recover damages for its breach, Breckenridge v. Crocker, 78 Cal. 533, 21 Pac. 179; Association v. Phillips, 56 Cal. 539; Talmadge v. Arrowhead, 101 Cal. 367, 35 Pac. 1000; Nat. Bank v. Hall, 101 U. S. 50, 25 L. Ed. 822; Schenectady Stove Co. v. Holbrook, 101 N. Y. 48, 4 N. E. 4; Grafton v. Cummings, 99 U. S. 106, 25 L. Ed. 366.
>
> It is true generally that where no price is fixed in a contract for the sale of a commodity the law, upon

a delivery and acceptance of the things sold, implies an understanding between the parties that a reasonable price is to be paid, and in such a case the contract will be deemed to be executed. In other words, in the absence of a fixed price, or an agreement as to the mode of ascertaining the value of the goods sold and delivered pursuant to the contract of sale, the purchaser will be held liable for the reasonable value of the goods. 1 Mechem on Contracts, § 206; Benjamin on Sales (7th Ed.) p. 91, § 85; Taft v. Travis, 136 Mass. 95; Prenatt v. Runyon, 12 Ind. 174.

Where, however, the price of the commodity called for, but not delivered, is to be subsequently ascertained and fixed by the valuation of others, or by the agreement of the parties, the contract of sale is incomplete and non-enforceable until the price is so fixed or agreed upon. Wittkowsky v. Wasson, 71 N. C. 451; Bigley v. Risher, 63 Pa. 152; Foster v. Lumberman's Mining Co., 68 Mich. 188, 36 N. W. 171; Williamson v. Berry, 8 How. 544, 12 L. Ed. 1170; Devane v. Fennell, 24 N. C. 36; Albermarle Lumber Co. v. Wilcox, 105 N. C. 34, 10 S. E. 871; 1 Mechem on Contracts, § 209; Wilken Mfg. Co. v. Lumber Co., 94 Mich. 158, 53 N. W. 1045; Bales v. Gilbert, 84 Mo. App. 675; Hutton v. Moore, 26 Ark. 382. In the case at bar the prices to be paid for the goods which were to be purchased yearly by the defendant, for a period of five years, as well as the terms and conditions upon which the sales of said goods and merchandise were to be made, were not specified in the contract, but were, as indicated by the contract and the findings of the court below, to be ascertained and fixed from time to time by the future agreement of the parties.

The due execution of a contract requires the assent of at least two minds to each and all of the essentials of the agreement; and it is only upon evidence of such

> assent that the law enforces the terms of a contract or gives a remedy for a breach of it. It is apparent from the findings that the minds of the parties in this instance never met upon the essentials of price and terms of payment; and therefore the trial court's conclusion of law that the contract in controversy was void and incapable of enforcement because of its uncertainty in the particulars stated was the only conclusion that could logically or legally be drawn from the findings of fact."

Similarly, in *Booth v. A. Levy & J. Zentner Co.,* 21 Cal. App. 427, 131 Pac. 1062, where the price was left to be "agreed upon". Similarly, in *Stone Drill Corp. v. Stoody Co.,* 4 C. A. 2d 367, 40 Pac. 2d 945, where the contract said, "It is understood that the retail prices are to be set and maintained by mutual agreement", which said the Court "in effect is no agreement whatsoever". As stated by Judge Cardozo in *Sun Printing & Pub. Assn. v. Remington Paper & P. Co.,* 235 N. Y. 338, 139 N. E. 470, 471, col. 2, "The result was nothing more than 'an agreement to agree' ". So, in *Leonard C. Pratt Co. v. Roseman* (1940), 20 N. Y. S. 2d 10, where the contract read "with the understanding that price is to be determined between us". In holding the agreement unenforceable the Court said (20 N. Y. S. 2d at 12):

> " 'Price is a material element of any contract of sale, and an agreement to agree thereon in the future is too indefinite to be enforceable.' Ansorge v. Kane, 244 N. Y. 395, 398, 155 N. E. 683, 684. As was said by Cardozo, J., in Sun Printing & Publishing Ass'n v. Remington Paper & Power Co., Inc., 235 N. Y. 338, at page 344, 139 N. E. 470, at 471: 'Market prices in 1920 happened to rise. The importance of the time element

becomes apparent when we ask ourselves what the seller's position would be, if they had happened to fall. * * * The parties attempted to guard against the contingency of failing to come together as to price. They did not guard against the contingency of failing to come together as to time. Very likely they thought the latter contingency so remote that it could safely be disregarded. In any event, whether through design or through inadvertence, they left the gap unfilled. The result was nothing more than "an agreement to agree".' "

Likewise, in *Boatright v. Steinite Radio Corp.,* 10 Cir., 46 F 2d 385, where the sale was "at prices to be agreed upon from time to time" (46 F. 2d at 386, col. 2), the Court said (46 F. 2d at 389, col. 1):

> "Where an essential element of a contract is reserved for future agreement of the parties, no legal obligation arises until such future agreement is concluded. Weegham v. Killefer (D.C. Mich.), 215 F. 168, 170; Speirs v. Union Drop Forge Co., 180 Mass. 87, 61 N. E. 825; Williston on Contract, vol. 1, § 45.
>
> An executory contract to sell, which provides that the price shall be fixed by future agreement between the parties, is incomplete and nonenforceable until the parties agree on the price. Williston on Sales, vol. 1, § 168; Speirs v. Union Drop Forge Co., supra; Elmore, Quillian & Co. v. Parrish Brothers, 170 Ala. 499, 54 So. 203; Bigger & Sons v. Johnson, 106 Ark. 89, 152 S. W. 291."

It is to be noted in that passage that the Court cited *Williston, Contracts,* § 45, which goes to the root of the matter as follows:

"Although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if something is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the very terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise. It should be observed, however, that though such a promise is invalid, it will not necessarily invalidate an entire agreement of which it forms a part. Whether it will have this effect depends upon its relative importance and its severability from the remainder of the contract of which it forms a part."

The Court also cited *Elmore, Quillian & Co. v. Parrish Bros.,* 170 Ala. 499, 54 So. 203. Therein, the contract read, "to be agreed upon at time of delivery"; and the Court said (50 So. at 204):

"It is the duty of the courts to lean against the destruction of contracts on the ground of uncertainty. Holst v. Harmon, 122 Ala. 453, 36 South. 157. This is important, certainly, but another consideration of controlling importance is that courts have no right to impose contracts upon parties, and this they do when they interpolate or eliminate a term of material legal consequence in order to save them. We find it impossible to eliminate the clause in question. It follows, in our opinion, that the contract alleged in counts 2 and 4 is void for uncertainty."

And similarly at bar, it is impossible "to eliminate" the contract provision that the price of 33,309 cases was to be subject to future "negotiations between the parties". To

"eliminate" the provision would be to change the contract, which no Court has ever considered that it is empowered to do.

As stated in *Williston, Contracts,* § 45:

> "Since either party by the very terms of the promice may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise."

That passage from Williston is of wide application in contract law, and has been twice quoted by Appellate Courts of California and approved as sound law:

Howard v. Burrow, 77 Cal. App. 4, 8-9, 245 Pac. 808, 810;

Los Angeles Soda Works v. Southern California Aquazone Co., 103 Cal. App. 105, 108, 284 Pac. 253, 254, col. 1.

Among the cases cited by Williston to his § 45 is the frequently cited case of *Shepard v. Carpenter,* 54 Minn. 153, 55 N. W. 906, where it was said:

> "An agreement to enter into negotiations, and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. There would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain whether any, or, if so, what damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations."

That passage from *Shepard v. Carpenter,* supra, has been twice cited and followed by Appellate Courts in California:

Dillingham v. Dahlgren, 52 Cal. App. 322, 330, 198 Pac. 832, 835, col. 2;

Toms v. Hellman, 115 Cal. App. 74, 78, 1 Pac. 2d 31, 33.

In the case of *Kerr Glass Corp. v. Elizabeth Arden Corp.*, 61 C. A. 2d 55, at page 56, it is said:

> "An excellent statement of the principle relied upon by defendant is to be found in *Dillingham v. Dahlgren*, 52 Cal. App. 322, at page 330 [198 P. 832].
>
> 'An agreement that parties will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon.'
>
> Also see *Howard v. Burrow*, 77 Cal. App. 4 [245 P. 808]; *Los Angeles Soda Works v. Southern California Aquazone Co.*, 103 Cal. App. 105 [284 P. 253]; *Toms v. Hellman*, 115 Cal. App. 74 [1 P. 2d 31]. In the last mentioned case, at page 78, a number of California cases in support of the proposition are collected."

Section 9 of the Uniform Sales Act, now Calif. Civil Code, § 1729, was copied from § 8 of the English Sales Act of 1893; and in *Benjamin on Sale*, 6th ed. (1920), page 168, and 7th ed. (1931), page 159, it was said (before the adoption of the Act in California in 1931):

> "If the parties agree that the price shall be as subsequently arranged between them, no contract of sale

> exists unless and until the price is fixed, for the parties have reserved to themselves an option as to the price, which is an essential element of a contract of sale, and the rule of reasonable price does not apply as the parties have impliedly excluded it."

The parties reserve to themselves the right to bargain. They do not delegate the bargaining to the members of a jury.

The cases cited by cross-appellant, at its pages 16 to 19, are not in point. In *U. S. v. Swift & Co.*, 270 U. S. 124, 70 L. Ed. 497, throughout the many months of World War I the parties had determined the price once each month, but followed a regular usage and formula. In *Kann v. Wausau Abrasives Co.*, 81 N. W. 535, 129 Atl. 374, the price was not to be subject to negotiations, but was to depend on the ascertainment of facts. In *Allen v. Sam*, 120 S. E. 808, the price was to be determined by the prices on the Cotton Exchange. In *United Lumber Co. v. Modesto*, 23 Cal. App. 2d 130, the price was to be based on the open market price of cement. In *Memphis Furn. Mfg. Co. v. Wemyss Furn. Co.*, 2 F. 2d 428, there were previous dealings and an established practice between the parties. In *Buggs v. Ford Motor Co.*, 113 F. 2d 618, the price was determined by a nationwide list price of automobiles. In *Johnson Oil Ref. Co. v. Elder*, 96 Colo. 314, 42 Pac. 2d 610, and in *Shell Oil Co. v. Wright*, 167 Wash. 197, 9 Pac. 2d 106, the prices of gasoline and oil were determined by the officially posted price current throughout an interstate region. The distinctive reasoning is clearly stated in *Buggs v. Ford Motor Co.*, supra, as follows (113 F. 2d, at 620, col. 2):

> "The parties had been dealing with each other prior to the execution of the last contract. They knew of

the practices of each other. The dealer knew that automobiles were redesigned and new models appeared yearly and as a result prices changed at least seasonally. Defendant's business was nationwide and its agents were many. It was to this known situation that the contract referred. The parties negotiated with a background of past dealings and mutual knowledge of the practices of the trade. 'The net list prices and discounts from published list prices' appearing in paragraph 2 were well known to both parties. These net list prices and published list prices were the same to all dealers. They changed as necessity required. They were not lacking in definiteness, but provided a method whereby the prices could be definitely ascertained at any time.''

(b) So far, we have shown that there was no enforceable contract as to the 33,309 cases. We may, however, assume arguendo a valid contract, but then inquire how damages could be ascertained when the parties had not yet fixed the price? That was the approach of the Court in *Watts v. Weston*, 2 Cir., 62 Fed. 136. There, the contract was for the entire output of a colliery for a period of 21 years, ''at a price to be agreed upon from month to month''. After performance for five years, the seller refused further performance. The trial judge directed a verdict for plaintiff in the nominal amount of ''six cents only''. In affirming the judgment, the Court of Appeals said:

''In our opinion, the plaintiff was not entitled to recover any but nominal damages. The agreement of June 25, 1880 bound Knevals and the colliery only to sell the New York firm coal at a price to be agreed upon between the parties from month to month. The profits of the firm would manifestly be the difference

between the price thus fixed, plus such expenses as they might be put to, and the price they might be able to obtain for the coal in the New York market. As the price to be paid the colliery was left wholly unsettled by the contract, and could be made certain only by further agreement of the parties from time to time, there is nothing, in the absence of such further agreement, with which to compare the market price at which coal, if shipped, could have been sold by the firm, and thus determine the profits which might have been lost by a refusal to sell at all. Not only is the contract uncertain as to the price to be paid by the firm, but it is not by its terms capable of being made certain either by reference to some umpire in case of a disagreement, or by providing that in the absence of an agreement it should be taken at the market price. Nor is there sufficient in the evidence to warrant a finding that the parties had practically so interpreted it as to dispense with the successive agreements as to price for which it provides. No doubt, in figuring for a coming month, both sides naturally enough took the market price of coal in the preceding months as a basis; both also took into consideration the tendency of the market for the future; but the important fact as to practical interpretation is that they did in fact from time to time agree upon the price. Neither seems ever to have acted upon the assumption that such price was to be fixed otherwise than with the concurrence of both. Moreover, it is difficult to see how, under the contract, there could be, as the plaintiff contends, any 'market price' for Primrose coal 'at the colliery'. A market implies competition, and, if the entire output was to be turned over for 30 years exclusively to a single customer, it is quite apparent that unless some control over the price was reserved to the

colliery it would be entirely at the mercy of the customer, who might fix the market at the mines by the price it was willing to pay. Nor is it to be supposed that the price to be paid was the market price of coal of its kind in New York, less expenses of transportation and sale. In the absence of a selling commission,—and the contract provides for none,—this would leave no profit to the consignees. We find nothing in the case from which a jury could determine what price the contract required plaintiff's firm to pay during any month not covered by an agreement as to price, and without that element the damages resulting from a failure to sell them coal are not susceptible of adjustment."

(c) There is an additional reason why any recovery should be limited to 26,691 cases as a basis, i.e., the contract lacked mutuality with respect to the remainder of 33,309 cases. Paragraph "Fourth" of the contract reads (italics and brackets added):

> "Fourth: Second party hereby agrees that the assorted quantities [26,691 cases] bottled and stored have been sampled by him and are herewith accepted in entirety, and the party of the first part assumes no further liability as to the quality of the wines, but on quantities [33,309 cases] not yet bottled it is agreed that prior to acceptance, samples will be forwarded to the party of the second part *for its approval,* and in the *event of non-approval* nothing herein contained shall prevent party of the first part from disposing of such stocks through other channels should it so desire."

In short, approval or disapproval was left wholly to the will of *Park, Benziger & Co., Inc.* By the law of California such a contract is wholly lacking in mutuality: *Charles*

Brown & Sons v. White Lunch Co., 92 Cal. App. 457, 268 Pac. 490. "Mutuality of obligations is an essential element in every binding contract", *County of Alameda v. Ross*, 32 C. A. (2d) 135, at 145, and cases there collected. (89 Pac. (2d) 460, at 465.)

Cross-appellant attempts to overcome the defect of lack of mutuality by an argument, at its pages 20, 21 and 22, about tender and acceptance of samples on the future 33,309 cases of wine. It claims, at its page 21, that a standard for tender and acceptance was set out in the written modification dated February 3, 1943, Plaintiff's Exhibit 2. (Annexed as Appendix B to the Opening Brief for Appellants on the main appeal.)

The argument for cross-appellant is based upon the false premise that "the wine is represented as being of a certain quality" (their page 20) and on their next page, 21, they assert that "the standard was set forth with particular care in the modifying letter attached to the contract". The trouble with those assertions is that they are simply false. All that the "modifying letter" of February 3, 1943, says about the matter is that the 26,691 cases then in existence "are to the best of our knowledge vintage wines of 1937 and 1938" and that they were "produced and bottled by the California Wine Association". That is merely a description of wine then in existence. The 33,309 non-existing cases are not described and no standard is set for them, and we do not see how, by any stretch of the imagination, it can be said that when those 33,309 cases came into existence in the year 1945, they were to be filled with bottled wines of the "vintage" of "1937 and 1938". As to quality, nothing is said in the contract either as to the 26,691 cases or

the 33,309 cases; and outside the contract the evidence shows nothing ever said about quality. The defendants had never dealt in wine before, the plaintiff had never bought wine from the defendants before, and indeed the evidence indicates that the plaintiff's previous dealings in wine had been as an importer of foreign wine, and this venture of theirs in California wine was something new. The situation clearly distinguishes from the case of *Goodlove v. Russell,* 184 Or. 445, 293 Pac. 936, 937, cited and quoted at page 21 of cross-appellant's brief. In the report of that case the following statement is made by the Court immediately *preceding* the passage quoted by the plaintiff:

> "The quality of the eggs is defined as not undersized, thin-shelled, or misshapen, and none of them were to have been subjected to a temperature of less than 50 degrees nor more than 70 degrees."

It will be seen that what the Court was talking about was a specifically stated and defined standard of hatching eggs from a flock of 60 identified turkey hens then owned by and in the possession of the seller on his farm in Oregon.

II.

THIS BRANCH OF CROSS-APPELLANT'S BRIEF IS MERELY AN AFTERTHOUGHT.

The proposition argued by cross-appellant under its heading II is based upon what it calls, at the top of page 23 of its brief, its "second ground of cross-appeal", which is followed there by a quotation from R. 549 from which it appears that cross-appellant is merely quoting the second "point" contained in its Statement of Points. A

statement of points is not the genesis of an exception, but is simply a document permitted under Rule 75(d) FRCP when an appellant does not desire to bring up "the complete record" but desires to have transcribed and printed something less than "the complete record", and the Statement is simply an indication to the appellee of what may be safely omitted from the transcript of record in the appellee's cross-designation of matter to be contained "in the record on appeal", Rule 75(a) FRCP. In a parenthesis at page 23 of its brief, cross-appellant tells the Court to "see appendix for requested instructions and exceptions preserving this issue", but when that appendix has been read, and indeed when the whole of the transcript of record has been read, it will be seen that cross-appellant never at any time during the trial raised, or had ruled upon, or brought to the attention of the trial Court, the *specific* contention that it now seeks to make. All that was ever before the trial Court was the main question whether the parties had ever agreed upon a price covering more than the stock of 26,691 bottles of wine on hand when the contract was made. If, instead of cross-appellant's present afterthought, it had desired during the trial to give to the jury as the basis of their award the number of cases reached by multiplying a carload of 1500 cases by the number of monthly carloads from the time delivery was to begin until the end of 1944, instead of using a basis of either 60,000 cases or 26,691 cases, cross-appellant should have presented the matter through a specific request for a specific instruction. The Court below could then, under Rule 51 FRCP, have informed counsel "of its proposed action upon the request" prior to the argument to the jury, and thereupon this particular

matter could have been argued before the jury. When one reads the top paragraph of page 25 of cross-appellant's brief, one sees that it is simply a jury argument claiming for the plaintiff that the award of damages should have been based upon 37,500 cases. It could have been argued to the jury that that figure of 37,500 is far-fetched: (a) In what month was the first carload to be shipped? By the end of April 1943 cross-appellant had not yet printed the labels. When would the labels have been printed? When would they have been shipped from New York to San Francisco and become available to cross-appellees for putting on the bottles? When would cross-appellant have decided upon the printing or marking to be placed on the outside of the cartons in which the bottles were to be packed and shipped? How long thereafter in these days of war priorities would it then take cross-appellees to have had such cartons manufactured and thus marked? (b) Would the jury have found that the parties to the contract meant by the phrase "additional quantities for the holidays" to include Thanksgiving as cross-appellant now suggests, or merely the Christmas-New Year holidays? Moreover, since an extra "holiday" carload was merely optional with cross-appellant, would it have exercised the option?

Cross-appellant now reaches 37,500 cases apparently as a matter of law. The jury might have decided upon no more than 26,691 cases as a matter of fact.

Furthermore, as we have demonstrated under heading I, supra, prices were never agreed upon for more than the 26,691 cases submitted to the jury as a basis. The specific prices per case mentioned in the contract related only to 26,691 cases, i.e., "the quantities now bottled and stored"

and the prices were "for this block of merchandise", the block of 26,691 cases.

III.

THE COURT BELOW DID NOT ERR IN EXCLUDING EVIDENCE OF SALES BY CROSS-APPELLEES SUBSEQUENT TO APRIL 27, 1943.

The Court below excluded evidence of sales by cross-appellees on dates subsequent to the date of breach, April 27, 1943. The dates and prices of subsequent sales were as follows:

1943	Price per case
June 19	$6.50
July 17	6.00
21	6.00
22	6.00
23	6.00
24	7.00
Aug. 13	7.00
20	7.00
	6.50
27	7.00
Sept. 1	6.50
15	7.00
17	7.00
22	7.00
Oct. 29	7.50
Nov. 11	7.50
12	8.50
13	8.50
15	8.50
19	7.50
22	8.50
1944	
Feb. 26	8.50

There was no error in the ruling, for several reasons:

(a) The contract prices per case for deliveries during 1943 were $5.25 for dry wines, and $6.00 for sweet wines. The above list of sales at varying prices from $6.00 to $8.50 per case exceeded the contract price of $5.25 to the extent of 75 cents to $3.25 per case. The damages of $72,687.50 awarded for 22,191 cases (26,691 minus 4,500) amount to $3.27 per case. If there was error in excluding the evidence, it was harmless; indeed, it was beneficial to cross-appellant, because the excess of proceeds of sales above the contract price was much less than the amount of the verdict.

(b) The argument of cross-appellant is founded on confusion. It argues (its page 26) that sales by cross-appellees "were admissible as an alternative measure of damages, as was held at the first trial". That goes outside the present record but needs reply. At the first trial there was a trial issue for the jury whether the wine could be obtained elsewhere in the market, and hence they were instructed in the alternative, to use one measure or the other, depending on their finding that the wine was or was not available elsewhere. That trial issue was not present in the second trial, but without objection the Court below charged the jury, R. 520:

> "I instruct you that the evidence before you is insufficient to show that the goods were obtainable elsewhere, that is, it is insufficient to show an available market. On the contrary, it shows no available market."

Therefore, the present record negatives any basis for the alternative of "market value".

In *Righter v. Clark*, 60 Atl. 741, the claim of a buyer of coal for loss of profits on resales was denied, because the coal was available elsewhere in the market, and the Court said (60 Atl. at 742, col. 1):

> "The coal could easily have been replaced by purchasers from others, with the same opportunity for profit on resales."

As stated in 46 *Am. Jur.* 803:

> "The rule allowing such damages [the difference between the agreed price and the market price] is based on the assumption that full indemnity is thereby offered to the buyer, for by going into the market he may procure the commodity contracted for, charging the seller with the difference in price, if any. This rule applies where there is a ready market for the goods purchased of goods like them, but does not apply where there is not such a market."

Further, 46 *Am. Jur.* 811:

> "Where there is not a ready market for the goods purchased, the **reason** for the rule allowing the recovery of the difference between the contract and market prices **ceases**, and the rule has no application."

Market price implies the existence of a market, of supply and demand, of sellers and buyers, *Heiner v. Crosby,* 3 Cir., 24 F. 2d 191, 193. The term "market value", as the words fairly import, indicates price established in a market where the article is dealt in by such a multitude of persons, and such a large number of transactions, as to standardize the price; individual dealings are not competent to prove it, *North American Tel. Co. v. Northern Pacific Ry. Co.,* 8 Cir., 254 Fed. 417, 418. A casual sale does not establish a market, *Le Blume Import Co. v. Coty,*

2 Cir., 293 Fed. 344, 351. Market price is not an imaginary fictitious thing, but is the price at which goods are actually being sold in the market at the time or times in question, *Birdsong & Co. v. Marty*, 163 Wis. 516, 158 N. W. 289, 292, col. 1. A market cannot be considered available unless the buyer can satisfy his needs therein, *Empire Box Corp. v. Jefferson Island Salt Mining Co.* (Del.), 36 Atl. 2d 40, 46; *Abrams v. C. Schmidt & Sons,* 17 Atl. 2d 681, 684.

The confusion in which cross-appellant's argument is founded becomes worse at its page 28, where it quotes from 55 *C. J.* 1161 a passage about determining value "by the advanced price at which the *buyer* has agreed to sell them", etc. That passage occurs in Sales, § 1149, in the course of the Corpus Juris treatment of Remedies of *Buyer,* §§ 1054-1167, and is utterly irrelevant to sales by a *seller.*

Cross-appellant's argument is pregnant with further confusion in treating a *seller's* profit as coinciding somehow with a *buyer's* loss of profits. The terminology is cleared when we keep in mind that "gain prevented is a more accurate term than loss of profits", *Eckington & Soldiers' Home R. Co. v. McDevitt,* 191 U. S. 103, 113. It is a question of the buyer's gain prevented, not of a seller's profit made.

(c) Finally, even though it be assumed that evidence of sales was admissible, there was a fatal defect in cross-appellant's proffer, because it embraced sales over a range of ten months subsequent to April 27, 1943. The claim of cross-appellant is based upon a repudiation or anticipatory breach occurring on April 27, 1943, of a contract calling for deliveries in monthly installments over a period of years. That repudiation did not affect cross-

appellant unless it voluntarily *elected* to treat the repudiation as a breach. As said in *New York Trust Co. v. Island Oil & Transport Corp.*, 2 Cir., 43 F. 2d 923, 927, col. 2:

> "But aside from this, the claim of damages for the period from March 20, 1922, is based upon an anticipatory breach due to the appointment of the receivers of the transport company. The breach only affected the refining company if it elected to treat it as a breach. It never evidenced any such election so that, as regards itself, no breach existed. Central Trust Co. v. Chicago Auditorium Ass'n, 240 U. S. 581, 60 L. Ed. 811, L.R.A. 1917B, 580; Samuels v. E. F. Drew & Co. (C.C.A.), 292 F. 734; Johnstone v. Milling, 16 Q. B. 461, at page 467."

If a buyer elects not to treat the repudiation as a breach, then the contract stands, and each of the subsequent failures to deliver constitutes, for the purpose of determining market value, a separate and distinct breach. As said in 46 *Am. Jur.* 805:

> "Where the goods are to be delivered by instalments, and there is a failure to deliver two or more, or all of the instalments, the proper measure of damages is the sum of the difference between the contract and market prices of the quantity of each instalment not delivered at the respective times of delivery, and the place of delivery, each of the failures to deliver constituting for this purpose a separate and distinct breach."

However, before any deliveries began, indeed before cross-appellant supplied any labels or gave any shipping directions so that deliveries could begin, cross-appellant *elected* to treat the occurrences on April 27, 1943, as a repudiation or anticipatory breach *on that date,* and filed its complaint in this action 22 days afterward, on May 19, and in para-

graph X laid its claim on a repudiation occurring on April 27, 1943.

There is much confusion and discord in the decisions in England and America with respect to the date for measurement of damages where there is an "anticipatory breach" of a wholly unexecuted contract of sale. Under the doctrine of *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, and *Six Companies v. Joint Highway District,* 311 U. S. 180, 85 L. Ed. 114, the local rule is to be followed, and the local rule is found in *Lompoc Produce & Real Estate Co. v. Browne,* 41 Cal. App. 607, 183 Pac. 166. That was an action by a buyer against a seller for damages for repudiation or anticipatory breach of a contract for the sale of a crop of beans. Deliveries were due on or before November 1. The seller repudiated the contract on October 18. Complaint was filed on October 25. We have examined the transcript and briefs, which show that the evidence of market value was over objection confined to the market on October 18, when the beans had a market value of $12.00 per hundredweight, even though the market had fallen by the day the complaint was filed, on October 25. The trial Court instructed the jury as follows:

> "You are instructed to ascertain the quantity of beans recleaned which should have been delivered by defendant to plaintiff, under the contract in suit. Having so ascertained said quantity of beans recleaned, the measure of plaintiff's damages which you are to determine is the excess of value of said beans on the 18th day of October, 1917, at Salinas City, California, over the contract price thereof, namely, $7.75 per hundred pounds."

On appeal, the date of the repudiation was treated as "the time of the breach" and it was accordingly ruled that the trial Court had correctly used the market on the repudiation day of October 18 in measuring the damages, the Appellate Court saying:

> "We think that the absolute refusal of the defendant to perform conferred upon the plaintiff an immediate right of action. Garberino v. Roberts, 109 Cal. 126, 128, 41 Pac. 857; Stum v. Hadrich, 7 Cal. App. 242, 244, 94 Pac. 82; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Central Trust Co. of Illinois v. Chicago Auditorium Ass'n, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L.R.A. 1917B, 580; Cabrera v. Payne, 10 Cal. App. 675, 678, 103 Pac. 176. The market value of the beans at the time of the breach was a proper measure of damages. Masterson v. Mayor of Brooklyn, 7 Hill (N.Y.) 61, 42 Am. Dec. 38, quoted with approval in Hale v. Trout, 35 Cal. 229, at page 243; Roehm v. Horst, 178 U. S. 1, at page 21, 20 Sup. Ct. 780, 44 L. Ed. 953."

Turning to the cited page 21 of the report in *Roehm v. Horst,* we find that it is there said:

> "Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain."

That passage gives a reason for the rule which uses the date of repudiation as the date for measuring the damages. Turning also to the cited page 243 of the report in *Hale v. Trout,* we find it said:

> "When the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages."

Clearly, therefore, the rule in California is that when the plaintiff elects to sue immediately upon the repudiation, that election carries with it a correlative election to treat the day of repudiation as the day of breach.

The cross-appellant apparently contends that under Civil Code, § 1787(3), it was entitled to prove the successive market values from April 27 to the time of trial. We make alternative replies:

1. The section is from § 67 of the Uniform Sales Act, which was copied from § 51 of the English Sale of Goods Act (1893); and it has been ruled in England that the section was not intended to apply, and does not apply, to a case of anticipatory breach, *Millett v. Van Heck & Co.* (1921), 2 K. B. 369. If that be so, then the law of California has been left unchanged, and the case is ruled by *Lompoc Produce & Real Estate Co. v. Browne,* 41 Cal. App. 607, 183 Pac. 166, supra.

2. If the section does apply to a case of repudiation or anticipatory breach, then under the section the damages would be measured by the market

> "at the time or times when [the goods] ought to have been delivered, or if no time was fixed then at the time of the refusal to deliver". (Civil Code, § 1787(3).)

The first inquiry, therefore, is whether *"the time was fixed"* for deliveries. The contract does not fix times of delivery. It states a *rate* of delivery, i.e., "at the rate of one carload each and every consecutive month thereafter for the next three years during the month of February, 1943, and continue thereafter as stated up to the year 1945" with an option to the buyer for an additional car "for the holidays". (Contract, par. Second.) Before any shipment, however, the plaintiff was to prepare and supply its own labels. (Contract, par. Eighth.) The plaintiff would have to give shipping instructions before the defendants could make any shipments. In other words, before any "delivery" or any "time for delivery", each carload would have to be preceded by instructions from the plaintiff as to which and how many cases to put in the car and how and to whom and where to consign the car. Indeed, up to April 27 no such instructions had been given, nor had labels been delivered. In the light of the foregoing we have, then, a contract in which "no time was fixed". In the one American case under this part of the Sales Act, *Phillips Sheet & Tin Plate Co. v. W. W. Boyer & Co.,* 133 Md. 119, 105 Atl. 166, the contract was for 5000 boxes of tin plate. The contract said (105 Atl. at 167, col. 1):

> " 'Time of delivery: In approximately equal monthly quantities; each month's delivery to be treated and considered as a separate contract during the year 1916. Specifications: To be given at least 60 days in advance of shipping date.' "

Since the contract was made in December, 1915, shipment could not begin until the month of February, 1916, and the

Court construed it as a contract to ship one-eleventh of 5000 cases, i.e., 454½ cases, per month, February to December, 1916. By a letter of April 19, 1916 (quoted, 105 Atl. 168, col. 2), the seller repudiated the contract as to 2080 cases, i.e., all but 2920 of the 5000 cases. There was a steadily rising market in tin plate through the year 1916, and the trial Court admitted evidence of market prices throughout the period subsequent to the month of April; and in reversing the case, the Court of Appeals said:

> "The measure of damages under the Uniform Sales Act (article 83, § 88 of the Code) we think should have been 'the difference between the contract price and the market or current price of the goods * * * at the time of the refusal to deliver'; there being no special circumstances showing proximate damages of a greater amount, and **there being no time fixed for the delivery when the refusal to deliver took place.** There was therefore error in the thirty-third exception in not granting the motion of the defendant to strike out the evidence of Mr. Thompson and so much of Exhibit No. 42 referred to and incorporated therein as purports to give **the market price of tin plate subsequent to the month of April, 1916**; that evidence having been admitted subject to exceptions."

That case parallels the case at bar. In our case, it is equally true that there was "no time fixed for the delivery *when the refusal to deliver took place*". Our refusal occurred on April 27, and up to and including that date no shipment had been ordered, no shipping instructions had been given, and no labelling had been done.

3. There is perhaps no greater confusion in contract law than in that branch of it that has to do with the doc-

trine of repudiation or anticipatory breach. Much of the confusion is chargeable to Prof. Williston, because of his inability in the matter of logic to justify the bringing of a suit for damages for nonperformance of a promise before the time for performance had arrived. In the year 1901, he initiated polemical literature upon the subject with his essay, "Repudiation of Contracts", published in 14 Harvard Law Review, 317 and 421. In his subsequent texts in the law of Contracts and of Sales, he merely repeated his earlier polemical attack upon the doctrine. He seems to have been much encouraged in his position through non-acceptance of the doctrine in his own State of Massachusetts wherein the law school in which he taught for so many years was located, notwithstanding that Massachusetts has ended in unenviable solitude upon the question. After he published his polemic in 1901, a great controversy began raging, and the principal contributions to the subject were collected and published in 1931, in Chapter IX, "Anticipatory Repudiation", under the book title "Selected Readings on the Law of Contracts from American and English Legal Periodicals". The principal argument against the Williston view turned out to be that he was simply talking about the breach of an *express* promise in a contract, and all his difficulties of logic disappear as soon as it is realized that a suit brought immediately upon repudiation of an executory promise to be performed in the future, is in truth and reality not a suit for breach of an express promise performable thereafter, but is simply a suit brought at once at the time of breach of a present *implied* promise not to repudiate; and, finally, Prof. Williston arrived at an understanding of that as the true logical

basis of the doctrine. We quote the following editorial note, which appears at the bottom of pages 1071 and 1072 of the Selected Readings, supra:

> "In an address published in (1924) 71 N. L. Law Jr. 1128, 1142, Prof. Williston, while reiterating his objection to the doctrine of anticipatory repudiation, recognized that its commercial convenience had led to its adoption in most jurisdictions and added (p. 1142): 'In jurisdictions where this is true, I should be in favor of extending the doctrine rather than limiting it * * * I should advocate the adoption of a broad principle that every contract includes as an implied obligation a promise not to repudiate. I should then hold such repudiation a breach of contract like any other breach—requiring no election or immediate action in reliance upon it to help it out.'—Ed."

That admission by him in the year 1924 was, of course, long after the publication in 1909 of his book on Sales and the publication in 1920 of his book on Contracts, with the result that his treatment of the doctrine in those books was polemically designed to create confusion rather than to solve it. It is the clear rule in California "that that which is implied by law becomes as much a part of the contract as that which is therein written", *Standard Box Co. v. Mutual Biscuit Co.,* 10 Cal. App. 746, 750, 103 Pac. 938, 939, col. 2 bottom, and 940, col. 1 top; 6 *Cal. Jur.* 318, § 189. Undoubtedly, the sound basis of the decision in *Lompoc Produce & Real Estate Co. v. Browne,* 41 Cal. App. 607, 183 Pac. 166, is that the "breach" therein mentioned by the Court was a breach of a present *implied* promise not to repudiate and, that being so, the Court simply laid down a rule for measuring the damages for

breach of such a promise, the rule being that they are to be measured as of the market on the day of breach, i.e., the day of repudiation. It further follows therefrom that since the Sales Act deals solely with the measurement of damages for breach of an express promise to perform, the Act contains no rule for measuring the damages for breach of an *implied* contract not to repudiate; in consequence of which the case at bar is governed by *Lompoc Produce & Real Estate Co. v. Browne,* 41 Cal. App. 607, 183 Pac. 166.

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December 26, 1944.

Respectfully submitted,
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